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WHAT ARE THE LEGAL LIMITS OF DEPARTMENT OF DEFENSE DOMESTIC COUNTERDRUG SUPPORT OPERATIONS TO LAW ENFORCEMENT AGENCIES?

BY

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ii

ABSTRACT

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The National Drug Control Strategy that is proclaimed every year at the highest levels of government actually translates to some kind of action in the field. This is no more apparent than when it comes to law enforcement. Strategy that is planned at such a high level of government can become rather obtuse when it hits the ground. Military leaders at the grunt level must be able to understand the intent of this strategy in terms of legally executable orders. The infringement on constitutional rights caused by a misapplied order might damage the military's ability to support counterdrug operations for law enforcement agencies in the future. This research paper begins by showing where in law military counterdrug support to law enforcement agencies is allowed and to what extent. Then this paper examines by the illustration of scenarios several different missions for both Title 10 and Title 32 personnel to show some of the legal envelopes.

TABLE OF CONTENTS

| IN THE BEGINNING | 1 |
|---|----|
| PROBLEM? WHAT PROBLEM? | 3 |
| WE THE PEOPLE DO HAVE THE RIGHT. | 4 |
| MILITARY RESPONSE | 6 |
| GROUND TRUTH | 8 |
| TRANSLATORS/LINGUISTS | 9 |
| INTELLIGENCE ANALYSTS | 11 |
| CANNABIS SUPPRESSION/ERADICATION OPERATIONS | 13 |
| RECONNAISSANCE/OBSERVATION | 15 |
| REVELATION | 18 |
| ENDNOTES | 21 |
| BIBLIOGRAPHY | 25 |

In the beginning . . .

Problems with the misuse of patent medicines began in the 1800s. The abuse of morphine during the Civil War is legendary. Cocaine and heroin began destroying the lives of thousands of Americans late in the eighteenth century. Drug abuse was a problem then, and it is even a larger problem now. Since there is no quick fix it will remain a problem for quite sometime into the future. But this problem must be contained before it can be corrected or at least minimized.

Legislative attempts to regulate drugs in general began with the Pharmacy Act of 1868. Eventually multiple anti-drug regulatory actions followed such as the Pure Food and Drug Act of 1906, the Opium Exclusion Act of 1909, the Harrison Narcotics Act of 1914 and the Narcotic Drugs Import and Export Act. Drug abuse is still out of control and any legislation to reduce this problem will not be effective if it is not enforced.

One way to eliminate the drug abuse problem is to make illicit drugs legal.

Supposedly, this type of action will solve both the crime and health problems associated with illicit drugs. This alternative approach is suggested by counter-culture magazines such as High Times, Hemp World, and New Age Patriot. The recent voter approvals of Proposition 215 in California and Proposition 200 in Arizona are the two most successful attempts at limited drug legalization. Sam Vagenas of Arizonans for Drug Policy Reform was quoted in High Times as having said, "We were very explicit about that, that Proposition 200 was a complete alternative to our current approach, because our current approach is failing." This alternative, of course, would work to a small degree if you believe that most drug users exist due to the thrill of committing an illegal act. This kind of logic does not take into account the new users since it would then be legal such as

alcohol. It is suggested that only 10% of regular users of alcohol develop a habitual problem with it, whereas, 75% of regular users of most illicit drugs would develop a habitual problem.³ The new health issues would be unimaginable. Look at the health costs of just cigarette smoking and alcohol use currently. All of the drug legalization talk never addresses the fact that there will always be some drug that is classified as illegal. If you use the illicit drug user's logic this would then become the drug of choice since it is the illegality that attracts users.

Therefore, something else had to be done. All of the anti-drug legislation needs to be aggressively enforced. After several years of law enforcement agencies battling this terrible problem, President Reagan decided to engage the military might of this nation towards this fight.

The use of the military in any domestic operation must be undertaken with the greatest of care. The constitutional rights of the citizens of the United States are paramount and must not be trampled upon. Two of these basic rights are the right of privacy and the right of protection. Military personnel have defended these rights for over two hundred years. However, the illicit drug problem is threatening our right of protection. Our most recent presidents have concluded that the military is needed, with certain constraints, to fight this menacing problem. And this needs to be done without violating our right of privacy.

This paper examines several different types of military missions, their applications at the ground level and the legal envelope at which they can be executed. Most criminal investigations terminated for cause, by the government, are not due to the perpetrator is

innocence, but due to the investigation's flaws. These are usually errors of misapplication of law enforcement or military power. Local military commanders and their civilian law enforcement counterparts must understand the rules so they do not endanger their ability to continue this honorable fight.

Problem? What Problem?

Does the United States have a drug problem? President Clifton thinks so. He wrote in his transmittal letter for The National Drug Control Strategy: 1997 to the Congress of the United States, "Every year drug abuse kills 14,000 Americans and costs taxpayers nearly \$70 billion." His last two predecessors also believed that the United States suffers from a drug problem. President Bush called drug abuse "The greatest threat facing our nation today" President Reagan, as mentioned, earlier answered the call against this threat by allowing the military greater jurisdiction.

The suffering and costs caused by illegal drug trafficking must not go unanswered. The health problem created by illicit drug usage is also overwhelming. Every year more than 500,000 drug-related hospital emergency room episodes occur. In addition to those health problems are that the "Hardcore drug users frequently are "vectors" for the spread of infectious diseases such as hepatitis, tuberculosis, and HIV." What a terrible plight it is to have all that self-induced suffering.

Drug abuse does not affect just the user. In fact, the problem is wide ranging.

Crime and illegal drug use are closely related. "In most cities, more than 50% of those

tested (arrested) were found to have used drugs recently." Those were just the voluntary tests. Drugs play a part of many crimes. President Clinton illustrates this when he writes, "More than half of all individuals brought into the Nation's criminal justice systems have substance abuse problems." This is true whether the crime is to buy or sell drugs or just being under the influence of illicit drugs at the time of the crime.

The financial burden on the citizens of this country due to crime and health issues related to drug abuse is staggering. Added to these costs, is the expense of illegal drugs in the workplace. "Seventy-one percent of all illicit drug users aged eighteen and older (7.4 million adults) are employed, . . ." Drug abuse negatively effects productivity and safety in the workplace. Poor job performance and absenteeism are greater among drug users than non-users. This could not be allowed to continue.

A strategy had to be created to stem the tide of drug abuse. The National Drug Control Strategy has been intentionally based on the premise that, "Illicit drug use hurts families, businesses, and neighborhoods; impedes education; and chokes criminal justice, health, and social service systems." This strategy and execution thereof must work and conform to current laws and regulations.

We the People Do Have the Right

Does the government have the right to prevent drug abuse and, by extension, to intervene in the illicit drug market? The argument that the government, as an agent for the people, has the right to protect its people is well founded within the United States

Constitution. Even the Preamble to this document states, "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure the common defense, promote the general Welfare, . . . "12 'Providing for the common defense' and 'promoting the general welfare' are requirements, not choices, of government. In fact, subsequent to the United States Constitution being written there is a reference to this theory in the Declaration of Independence when it states, "He has refused his Assent to Laws, the most wholesome and necessary for the public good." This statement shows the concerns of the founding fathers for the need of laws and the means to protect the general population. Noteworthy is that President Clinton uses a famous quote in The National Drug Control Strategy, 1997 from Thomas Jefferson, the primary author of the Declaration of Independence, which says, "The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government."14 President Clinton uses this quote to illustrate his point that the government has the responsibility to protect its citizens. Therefore, the right for any government's fight against the illegal drug trade is based on the fundamental belief that the first duty of the government is to protect its citizens.

Once the leadership of any government perceives that drug abuse or any other threat is a national danger then attending to that threat is a foregone conclusion. President Reagan concluded that the drug problem was definitely a national threat, which is why his directive, as it appears, in FM 100-20, Operations Other Than War states, "In 1986, Presidential National Security Directive 221 declared drug trafficking a threat to the national security." Former Secretary of Defense William J. Perry wrote in 1996 in the

Annual Report to the President and the Congress that the "illegal drug trade" is a threat to the interests of the United States. ¹⁶ Later, President Clinton clearly stated that, "Illegal drugs constitute one such threat." ¹⁷ So not only does the government have the right, it has the obligation to protect its citizens from a threat such as drug abuse. It must use all legal resources at its disposal, and that includes the military.

Military Response

 Code. The Posse Comitatus Act has little effect on the Militia (National Guard) except to show the concerns of the legislative branch with respect to civil rights.

Constitutional rights are an area that all Americans should keep constantly in the forefront, particularly if one is in either the military or law enforcement. About the only issue that is truly different between the Armed Forces, Title 10 United States Code, and the National Guard, Title 32 United States Code, is that Armed Forces personnel are not allowed to entry onto private property without the owners consent. Additionally, missions outside of the Continental United States (OCONUS) are done in a Title 10 United States Code status whether the personnel were originally Title 32 or Title 10. However, OCONUS missions will not be a matter of discussion in this paper.

In addition, the Posse Comitatus law allows for the use of the military if authorized by Congress. Vincent T. Bugliosi writes in his book <u>The Phoenix Solution: Getting</u>

Serious About Winning America's Drug War, "In any event, in any conflict between the language of a statute (Section 1385 prohibiting Posse Comitatus to "execute the law") and the Constitution (Art. II, Section 3 mandating that the president ensure that the nation's laws are "faithfully executed"), the statute has to defer to the Constitution."

The National Defense Authorization Act of 1989 gave a greater support role to the Department of Defense. The operative word being 'support'. For although the Department of Defense was given several new roles in the counterdrug effort, it was with the understanding that these new missions would be primarily in a support relationship to law enforcement agencies. The only notable exception would be in the Department of Defense's new ability to be the lead agency for the detection and monitoring of maritime

and aerial transit of illicit drugs. The Anti-Drug Abuse Act of 1988 and the Defense Authorization Act of 1989 also expanded the military's role in counterdrug operations.²¹ Still, with all these regulatory actions, special care must be taken to ensure that military support operations stay within the legal envelope. Activities on the ground may sometimes be adversely effected by 'field drift' or 'mission creep'. There is a need for constant supervision and guidance by local military leaders.

Ground Truth

It is important to remember that this paper was written to explore the American public's perception of military counterdrug operations within the Continental United States. A better understanding of this perception will allow ground commanders and field leaders to visualize the process of translating the National Drug Control Strategy into legal executable orders. All the lofty ideals in the world can not help a local commander who has violated the constitutional rights of a citizen.

Missions, operation plans, and five paragraph field orders are where the National Drug Control Strategy's boots hit the ground. At least for the military this is true. Most military members know that plans usually do not survive the first few minutes of any operation. So legal restrictions, law enforcement agency desires, and the commander's intent are important to know as the fog of war turns what was black and white to shades of gray.

The military establishment of this country has divided the numerous counterdrug missions into several categories. The United States Army Forces Command lists them as ground reconnaissance, land detection/monitoring, air reconnaissance, training support, marijuana eradication, intelligence support, transportation support, diver support, engineering support, and maintenance support. The National Guard combines its list of missions into six categories with subcategories: program management, technical support, general support, counterdrug-related training, reconnaissance/observation, and demand reduction support.

23

In any case, we will analyze only those types of support operations from the aforementioned categories that really have the greatest potential for abuse. Specifically, we will investigate and hopefully illustrate only the counterdrug support operations that fall into the areas of translators/linguists, intelligence analyst work, domestic cannabis suppression/eradication operations, reconnaissance/observation (both surface and aerial).

Translators/Linguists

Translator or linguist support is one area that is very easy in which to cross over the legal line. NGR 500-2 states, "National Guard personnel will not participate in active/real-time Title III conversation monitoring or directly participate in interrogation activities." Title III refers to wiretapping. Title 10 forces are under the same restrictions. What this means is that military personnel can translate or use their linguist skills when working with a medium such as a written document or tape recording. This is

very difficult for some military translators to understand, since during war, national emergencies, or humanitarian relief, they perform their duties without this restriction. But it is fairly understandable, when you consider the difference between interviewing someone during an investigation, military or civilian, whom you perceive to be a victim versus one you believe to be the suspect. If at any point in time an investigator believes that the interviewee might be guilty of a crime then the investigator must consider notifying the suspect of his rights. These rights are consistent whether you reference the Fifth Amendment to the United States Constitution or Article 31, Uniform Code of Military Justice. Both basically state that you have the right of not incriminating yourself.

So as far as being a military translator in a real-time conversation you are perceived as an extension of the law enforcement community in the eyes of the public.

Additionally, real-time translation or eavesdropping is tantamount to spying. No military personnel are ever allowed to spy on United States citizens.

What if a military person accidentally overhears a conversation, regardless if translation is required? The answer is fairly easy. If this act was unintentional, then more than likely any evidence collected as a result of the conversation would probably be considered acceptable. This is very much like a fire/rescue person observing or hearing a crime during the course of a crisis. The original intent is not to spy, but to perform the duty within the normal scope of their job description. Spying or eavesdropping was never intended nor planned.

However, if the supported law enforcement agency actually planned to have military personnel perform a task that violates the law, then there could be major

repercussions. The least of which might be the termination of the investigation, possible loss of the case, and potential legal/civil action against the offenders (military or law enforcement personnel). Translators/linguists are to be used in a support capacity only by law enforcement agencies for the sole purpose of developing cases through the interpretation of foreign language documents and recordings. They should not crossover to become investigators.

Intelligence Analysts

Intelligence analyst work is very much like translation or linguist work. The same covenants apply. However, in the case of intelligence work the additional concern of maintaining data on United States citizens becomes paramount. Again, NGR 500-2 states, "The National Guard will not maintain or store final products in National Guard facilities or data bases." The United States Forces Command is more succinct in this case. As stated in its Counterdrug Action Officers' Handbook, "Military personnel will not collect, retain or disseminate to DOD information pertaining to U.S. persons. Data analyzed by the military analyst will remain the property of the supported law enforcement agency." Both these references indicate that information can be gathered, but must be given only to law enforcement authorities and never retained by military personnel.

DoD Regulation 5240.1-R says, "Information may be collected about a United States person who is reasonably believed to be engaged in international narcotics activities." When analyzing this statement, it is interesting that the Counterdrug Action

Officers' Handbook, as stated above, does not allow for the 'collection' of information on United States persons. However, seemingly in contradiction, DoD Regulation 5240.1-R states that information can be 'collected' about a United States person. This explains why a local ground troop leader might be confused. And what exactly is a "United States person"? Is this a United States citizen or anyone currently residing in the United States, or possibly just someone within the United States borders. Actually, this point is minimal compared to the other phrase "who is reasonably believed to be engaged in international narcotics activities." The definition of the word "reasonably" keeps many lawyers employed. This point could be argued. The real problem is that must DoD intelligence personnel know that the narcotics activities for which they are collecting and analyzing data about is "international" in scope? The answer should be yes. Does this mean that locally grown marijuana, not intended for export is off limits to DoD intelligence? Sounds like it.

Military intelligence personnel would be well advised to follow the strict directions of the law enforcement agency for which they are performing the mission. An additional caveat being not mixing any other missions into their work. For example, intelligence analysts should never go on reconnaissance/observation missions. Furthermore, they must be in compliance with Executive Order No. 12333 of the United States Intelligence Activities signed by President Reagan. This directive gives requirements for each agency in regards to the collection and retention of intelligence information. The military analysts should receive the information to be analyzed from their civilian law enforcement counterpart not from another military person. The information to be analyzed should

always be at the direction of the supported law enforcement agency. To keep the integrity of the data, analysts should never be surveillance personnel. The fact of the matter is that intelligence analyst should work on data collected by others and not data generated by themselves.

Deception is another area that can entail trouble for a military person. An intelligence analyst may choose to wear civilian attire to work. If the reason for this was to specifically deceive the possible target, then the analyst is probably in the wrong place. The donning of civilian attire in an office environment is to not draw unwarranted attention from the general public to oneself, never for the purpose of deception.

Finally, it must be restated that while military intelligence personnel can perform many missions such as develop trend analysis, compile information, and generate reports, they must do so without personally participating in the search for or physical collection of evidence or intelligence data, which is a function of the police.²⁹ Military personnel performing law enforcement activities is a violation of law and can be very damaging to the fight against the illicit drug trade.

Cannabis Suppression/Eradication Operations

Domestic cannabis (marijuana) suppression/eradication operations are probably the most visible to the public of all the support operations. Here again, the military can only function in a support capacity for the law enforcement agency. However, it is difficult to determine where the support effort ends and where the military accidentally takes a lead

role. Added to this difficulty, is the fact that this type of operation can take on a life of its own. This happens because there are many elements from other mission categories that are occurring simultaneously in this one. For instance, suppression/eradication operations usually have prior and developing intelligence, ground and aerial reconnaissance support, and possibly transportation requirements among others. This is not to mention the Environmental Protection Agency regulations and numerous state law requirements.

This particular type of mission is very difficult for Title 10 troops since, although much of the marijuana grown in this country is on public land, access to these gardens might be through private property. Finding the gardens is one mission, but eradication of the plants is a whole other issue. In this latter case, a military person might become inadvertently involved in evidence gathering instead of the intended contraband destruction. Of course being involved in the chain of evidence is strictly forbidden for either Title 10 or Title 32 personnel.³⁰

This type of mission also has one of the highest risk assessments of any operation.

This could be due to the intended target, accidentally discovery by another element conducting an illegal activity, or purely a safety episode. So great care must be taken when performing this mission.

A field leader might feel a little overwhelmed in this environment. It is important to remember to differentiate between the various types of missions and keep them separate. The most illustrative example of this premise is that any information gathered by a military service member, whether intentionally or not, should be given to a law enforcement agency. It is tempting for a military element to find a marijuana garden by

aerial reconnaissance and then proceed to eradicate it without the direction of a law enforcement agency. This action would be in error, and would be considered outside the legal envelope.

Reconnaissance/Observation

Reconnaissance/observation missions can be performed on land, sea, or air. They can be manned or unmanned. Additionally, these missions can be conducted in a mobile or static status. Reconnaissance/observation missions are directed towards a wide geographical area and not at a specific individual. This is to ensure compliance with the protection afforded to United States persons per the Fourth Amendment of the United States Constitution.

Surface reconnaissance is divided into three categories: unattended sensor support, visual reconnaissance/observation, and ground surveillance radar. Since visual reconnaissance/observation is the category within surface reconnaissance that is the most formidable when it comes to legal challenges, this paper will not address the other two categories.

The most important factors to remember in conducting a visual reconnaissance operation are the viewer's location, the target location, and the target description. As an example, Title 10 troops, as the viewers, cannot be on private land unless they specifically have the permission of the landowner. Usually the bad guys do not give their permission. Of course, the listening posts/observation posts might be on adjoining land. This does not

mean that just because the law enforcement agency has permission to be on that land, by extrapolation, so do the Title 10 troops. It can also get a little confusing if there are multiple owners of the land. Additionally, the military personnel might have to cross over several pieces of private land to get to the observation post. Does this mean that one must receive permission from all the effected landowners? Strictly speaking the answer is yes.

Title 32 troops (National Guard) do not have this restriction. As long as the law enforcement agency personnel are present and have the legal right to be on that private land, so do the Title 32 personnel. One of the past lessons learned would indicate that the military leader on the ground can and should ask the law enforcement agency if the legally required permission, such as a warrant, exists. This does not mean that the military leader is required to see it. Reviewing such documentation would imply knowledge of legal paperwork that most military personnel are not trained to have. Since this is a matter that can be challenged later in court, there exists only the requirement that the law enforcement agency acknowledge their right to be there. Accordingly, the National Guard (Title 32 personnel) can reasonably assume that they also have the right to be there.

This brings us to the issue of direct contact with the public. The policy of DoD of its personnel not having direct contact with the public is one for planning consideration.

This is to ensure that military personnel do not arrest, detained, or intimidate U.S. persons. However, after the mission starts, care must be taken to guarantee that this policy is maintained. Although, what is 'direct contact'? Is it just being in view of the public, or is it being within hearing distance? Probably the military leader's best test of this

would be if the proximity of his position might require discourse with the general public, then he might be in the wrong place. This is obviously a judgment call.

Other issues are target location and target description. Both of these should be limited to a broad open area and not a specific person or exact address. As an example, the term 'suspect' should never be in the military vocabulary when supporting law enforcement agencies. Another would be that military observers should be looking for movement in a designated large area and not specific criminal activity.

Aerial reconnaissance is divided into four categories: radars, unmanned aerial vehicles, infrared/thermal imagery, and photo reconnaissance. The most troublesome category, if not executed correctly with all the proper safeguards for civil rights, is the aerial visual techniques of infrared and thermal imagery, which is where this paper will focus.

Infrared/thermal imagery brings to mind science fiction illusions, which are feared by the public. Thermal imagery is the reconnaissance method that creates the most challenge. This technique (thermal imagery) can be considered too intrusive by the public, who have a reasonable expectation of privacy as provided by the Fourth Amendment to the United States Constitution.³¹ Therefore, special care should be taken to ensure that a law enforcement officer personally directs any operation of thermal imaging systems.

Thermal imaging systems are inappropriate for random/grid searches. Since indoor clandestine drug laboratories do not generate significant heat to differentiate them normal household or commercial heat generating sources, this method would be considered intrusive, as well as, and a possible violation of the Fourth Amendment.

Therefore, this method should only be employed to verify findings from other independently acquired information.

Also, there is the safety issue with aerial reconnaissance. Maintaining a particular height above ground for general flying in order to spot suspicious activity is not only a safety requirement, but is also now a legal requirement. This height requirement is generally considered to be 500 feet above ground. Additionally, pilots in command "will not fly into or land in known hostile areas and will ensure that passengers are instructed in the principles of aircraft safety." The distance from known hostile elements to the potential landing zone is required to be at least 200 meters, which is outside of small arms range.

Whether the mission is ground or air base does not matter so long as there is an application of proper safeguards for the public's constitutional rights. The local military commander or leader is responsible to insure the correct utilization of his/her troops.

Revelation

The military can be effectively used in the struggle against illicit drugs. Even a critic of the militarization of the counterdrug effort, Leif Roderick Rosenberger, recently wrote, "Indeed, the bulk of eradication and interdiction successes over the last several years have been either directly or indirectly attributable to consistent and professional military support." Nevertheless, the strategies and usage of the military must change

with the flow of illicit drug trade. FM 100-20 states, "The popularity of drugs among users shifts from time to time. So must government counteraction."³⁴

The military must always be continually vigilant of not infringing on the rights of the citizens of the United States. The military's role in domestic counterdrug support operations will most likely be shaped, not by legislation, but by the court system as it modifies the desires of the President and Congress. The courts will continually be thrusts into this struggle by the perceived errors of the military during counterdrug missions. It is prophetically stated in <u>Field Manual 100-5</u>, <u>Operations</u> that "This support may expand as national policy and legal prohibitions evolve." How true this has become.

In conclusion, it is possible to utilize the military as long as each and every mission stays within the guidelines and intent of the law. Almost all of the activities performed by the military require an analysis of action (military) and possible reaction (civilian) and then counteraction (military). This process must be considered for each and every mission.

For the hundreds of counterdrug support missions that this author has executed, the guiding principle used for the instruction of all subordinates was the thinking process mentioned above. Whenever an unexpected action occurred that required exigent counteraction, there were two questions that were asked: How much time was there to make that decision? And what facts were known at the time of the decision? These are important questions that every person in counterdrug missions should realize that they may have to answer. This should promote thought before action, which in turn, should prevent the violation of a United States citizen's rights.

Field commanders and junior leaders must always remember that they are serving a civilian boss (President) and are supporting law enforcement agencies. The military must conduct itself within the law at all times and never give the appearance of impropriety.

For it is well known that perception is reality in the eyes of the public.

The military only exists in this counterdrug environment due to orders received from higher. If the military activities become contrary to public desires then their contributions will be lost. If this occurs, then only the drug traffickers will win. This can not be allowed to happen. President Clinton wrote, "For our children's sake I ask Congress to join me in a partnership to carry out this national strategy to reduce illegal drug use and its devastating impact on America." This strategy must be carried out at the tactical level, where the military field leader can legally support a law enforcement agency. Stay within the legal envelopes and this struggle can be won.

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³³Leif Roderick Rosenberger, <u>America's Drug War Debacle</u>, (Brookfield: Ashgate Publishing, 1996), 31.

³⁴Department of the Army, <u>Operations Other Than War</u>, Field Manual 100-20 (Washington: U.S. Department of the Army, 15 May 1995), 9-2.

³⁵Department of the Army, <u>Operations</u>, Field Manual 100-5 (Washington: U.S. Department of the Army, 14 June 1993), 13-6.

³⁶William J. Clinton, <u>The National Drug Control Strategy</u>, 1997, The White House, (Washington, D.C.: U.S. Government Printing Office, 1997), iv.

³⁰United States Code, Title 18, Section 375, (1990).

³¹The Constitution of the United States of America, Article IV (Fourth Amendment, (1788).

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